

BEFORE THE SHORELINES HEARINGS BOARD
STATE OF WASHINGTON

ECHO BAY COMMUNITY
ASSOCIATION,

Appellant,

v.

PIERCE COUNTY, RICHARD KAUPILLA,
ANDY BLAIR and STATE OF
WASHINGTON, DEPARTMENT OF
ECOLOGY,

Respondents.

SHB NO. 05-027

FINDINGS OF FACT,
CONCLUSIONS OF LAW AND
ORDER

Appellant Echo Bay Community Association (Association) is challenging a Pierce County hearing examiner's decision upholding a State Environmental Policy Act (SEPA) determination of non-significance (DNS) for the proposed installation and operation of a herring net pen facility in Echo Bay. The Association is further appealing Pierce County's decision approving a shoreline substantial development permit (SSDP) and a shoreline conditional use permit (SCUP) for the project and the Department of Ecology's decision approving the SCUP. The hearing in the case was held March 6-7, 2006, with the first day in Gig Harbor, and the second day in Lacey, Washington. Administrative Appeals Judge, Phyllis K. Macleod, presided for the Board comprised of William H. Lynch, Chair, Kathleen D. Mix, Judy Wilson, O'Dean Williamson and Dan Smalley. Counsel David S. Mann represented the appellant Association, Counsel Thomas Oldfield represented respondents Kaupilla and Blair, Deputy Prosecuting

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1 Attorney Jill Guernsey represented Pierce County, and Assistant Attorney General Thomas J.
2 Young represented Ecology. The proceedings were recorded by Kim Otis of Gene Barker &
3 Associates, Olympia, Washington.

4 Witnesses were sworn and heard, exhibits were introduced, the Board conducted a site
5 visit, and the parties presented arguments to the Board. Based upon the evidence presented, the
6 Board makes the following:

7 FINDINGS OF FACT

8 1.

9 Richard Kaupilla and Andy Blair applied to Pierce County for State Environmental
10 Policy Act (SEPA) approval and for Shoreline Substantial Development (SSDP) and Shoreline
11 Conditional Use Permit (SCUP)¹ approvals to conduct a herring net pen operation in Echo Bay,
12 an area located along the northeastern shore of Fox Island. The applicants are the principals in
13 the F/V Puget, LLC. The Puget is a vessel they own and intend to use to fish for herring in the
14 waters of Puget Sound. The proposed herring pens would be located approximately 500 feet off
15 the eastern shore of Shorewood Beach, approximately 600 feet off the western shore of
16 Tanglewood Island, and approximately 500 feet off the northeastern shore of Fox Island. (Ex. A-
17 3, p. 1).

18
19
20 _____
21 ¹ A shoreline CUP was necessary because the shore along Tanglewood Island is designated conservancy. The net
pen is a permitted use in the rural residential shoreline applicable on the Fox Island side of the Bay.

1 2.

2 The shoreline of Fox Island in the project location is categorized as rural residential in the
3 Pierce County Shoreline Master Program (SMP). The shoreline of Tanglewood Island adjacent
4 to Echo Bay is shoreline conservancy. Tanglewood Island is a small island, accessible only by
5 boat, containing four or five residences, a former camp, and an abandoned lighthouse. The shore
6 on Fox Island in this area is fully developed with waterfront residences and additional homes
7 located upland from the Bay with views and/or water access.

8 3.

9 The proposed herring net pens would be 100 feet by 100 feet in size and extend
10 approximately one foot above the water's surface. The pens would have a four-foot wide
11 perimeter walkway and two-foot wide interior walkways. The structure would have only such
12 lighting as necessary to assure safe navigation. The area is particularly well suited for net pen
13 operations because it is sheltered, and at the same time has significant tidal flushing action to
14 help remove any waste. (Ex. A-4).

15 4.

16 The pens would be located in the same area formerly used for salmon net pens run by the
17 Washington State Department of Fish and Wildlife (WDFW) from the late 1970's to 2001.
18 WDFW used their pens to rear hatchery coho and hatchery fall chinook. The hatchery net pen
19 program was discontinued by WDFW in 2001 due to concern about the risks posed by ecological
20 interaction of hatchery chinook and chinook of natural origin. (Ex. R-7, p.5). The footprint of
21 the proposed herring pen will be forty percent smaller than the footprint of the WDFW salmon

1 pens. *Id.* at p.6. Mr. Kaupilla will be leasing the area from the Washington State Department of
2 Natural Resources (DNR). DNR has approved the lease subject to the applicants obtaining all
3 necessary permits. (Ex. R-5)

4 5.

5 The herring operation involves fishing during the nighttime hours. Herring dive deep
6 into the water during the day and cannot be effectively caught except during the night. The
7 applicants would keep the Puget off-site and begin fishing in the late night hours. The herring
8 season typically runs from April to October. (Kaupilla testimony). When the fish are caught
9 they must be placed into pens relatively quickly or they will die. This precludes waiting until
10 daytime to off-load the fish. Under the proposal, the fishing boat would enter Echo Bay during
11 the early morning hours and off-load the catch into the pens through a gravity-fed sleeve. The
12 boat would be at idle at the pen for up to twenty minutes for the off-loading process. (Ricky
13 Blair testimony). The restrictions placed on the project approval limit the applicants to two
14 twenty-minute off-loading trips into Echo Bay per night. Deck noise is restricted to only that
15 necessary for safe completion of the off-loading process. (Ex. RPC 4, p.9).

16 6.

17 The herring are being cultivated for ultimate use as fish bait. To prepare the fish for use
18 as high quality bait, it is necessary to “firm” them up. This involves housing the herring in pens
19 for around two weeks without food, so they lose a portion of their body fat. Periodically, the fish
20 are removed from the pens, shocked to death, and delivered to trucks for distribution to bait
21 markets. The fish are not fed and are not given any medications during the holding period. The

1 proposed operation is apparently consistent with the standard practices for producing recreational
2 herring bait. (Kaupilla testimony).

3 7.

4 Mr. Kaupilla is also the sub lessee of a net pen operation located in Mayo Cove, another
5 area of Puget Sound. The Mayo Cove operation has created odor issues and noise issues for
6 many neighbors. The odors appear to be primarily associated with drying and cleaning the nets.
7 The Echo Bay proposal would involve off-site drying and/or cleaning of the nets. The flushing
8 action in Mayo Cove is also much less favorable for net pen operations than the Echo Bay site.
9 Any waste generated by the fish during the holding period is far less likely to be easily dispersed
10 from Mayo Cove. While testimony of one witness stated that the conditions at Mayo Cove are
11 problematic, the evidence did not demonstrate similar odors would be experienced from the Echo
12 Bay operation. Such problems were not reported in connection with the salmon rearing
13 operation previously located in Echo Bay or from the herring pens located near the Fox Island
14 Bridge.

15 8.

16 Echo Bay is a popular recreation site for local residents as well as boaters from other
17 areas. Boats often anchor in the Bay during the warmer months and in many cases a number of
18 boats raft together. Des Moines Yacht Club has used Echo Bay for a regularly scheduled club
19 outing for a number of years. (Ex. A-17). Water skiers, tubers, kayakers, and other recreational
20 boaters use Echo Bay in the summer months. Echo Bay is often calm and the water condition is
21 appealing to water skiers. Some of the recreational users are concerned the proposed net pen

1 will present an obstacle to navigation in the area. While these recreational uses existed during
2 the time the salmon pens were in place, recreational users have enjoyed the open water since the
3 State net pens were removed and would like to see the current status continue. The net pen
4 location will leave approximately 500 feet on either side of the pens for navigation by
5 recreational users. The surface water area of Echo Bay is 55.91 acres and the proposed herring
6 pens have a maximum surface area of 10,000 square feet. The herring pens will occupy less than
7 one half of one percent of the total surface area of Echo Bay. (Ex. RPC 1, p.2).

8 9.

9 The applicants submitted a SEPA environmental checklist to the county in January 2004.
10 (Ex. A-1). The checklist stated the herring net pens would not negatively impact recreation in
11 the area or cause any odor emissions. The checklist focused on noise arising from construction
12 of the pens and did not discuss the noise expected from ongoing nighttime operations. Pierce
13 County circulated the checklist for comment and received a number of comments from residents
14 in the Echo Bay community raising concerns about the impacts of a commercial net pen
15 operation on this quiet residential area. (Ex. RPC 2).

16 10.

17 None of the government agencies contacted opposed the project. In fact, a number of
18 other required permits have been issued by agencies with jurisdiction, including a Hydraulic
19 Project Approval (HPA) issued by Washington Fish and Wildlife, Letter of Permissions from the
20 Department of Army Seattle District, Corps of Engineers, U.S. Fish and Wildlife Service
21 approval dated November 4, 2003, National Marine Fisheries Service approval dated September

1 15, 2003, and U.S. Coast Guard Navigational Aid approval. (Ex. RPC. 2, Staff Report p.3)(Ex.
2 RPC 1, pp.1-2).

3 11.

4 In support of the herring pen application, Steve Mitchell of Williwaw Scientific Support
5 Services prepared a biological evaluation of the project entitled *Echo Bay Floating Herring Pen*,
6 dated March 2003. (Ex. R-7). The biological evaluation was prepared to examine the potential
7 impacts of the herring net pen project on species protected by the Endangered Species Act. After
8 detailed analysis, the evaluation concluded the proposal would either be “not likely to adversely
9 affect” or have “no effect” on listed species. (Ex. R-7, p. 24).

10 12.

11 Pierce County reviewed the environmental information for the project and issued a
12 Determination of NonSignificance (DNS) dated September 24, 2004. The DNS concluded the
13 proposal, as conditioned, would have no significant adverse environmental impacts on fish and
14 wildlife, water, noise, transportation, air quality, environmental health, public services and
15 utilities, or land and shoreline uses. (Ex. RPC-1).

16 13.

17 The Pierce County DNS decision was appealed to the Hearing Examiner by both the
18 Echo Bay Community Association and by Mr. Kaupilla and Mr. Blair. A hearing was held on
19 the environmental appeals and the request for a SSDP and SCUP on January 6, 2005. At this
20 hearing, expert testimony on potential noise impacts was presented by the Echo Bay Community
21 Association. Acoustical engineer Jerry Lilly performed a noise study of the Echo Bay area and

1 took measurements of noise generated by the vessel, Puget, entering the Bay and idling the
2 engine in the vicinity of the proposed net pens. (Ex. A-9A).

3 14.

4 Mr. Lilly's first study was based on data obtained during the period November 9-11,
5 2004. Mr. Lilly used three monitoring sites to gather data: Position 0 on the west edge of
6 Tanglewood Island, Position 1 on the east shore of the Shorewood Beach Community, and
7 Position 2 approximately 750 feet southwest of the herring pen location. All the monitoring
8 locations were outdoors and the test was conducted in clear, calm weather. Mr. Lilly analyzed
9 the ambient noise level of Echo Bay, and concluded it is a very quiet location during the late
10 night and early morning hours. The existing ambient noise levels for the period 1:00 a.m. to 5:00
11 a.m. were 29.5, 33.2 and 32.1 dBA respectively, at the three monitoring sites used by Mr. Lilly.
12 Day-night ambient levels were 47.0, 49.6 and 48.4 dBA, respectively, for the same three sites.
13 The noise levels during the night are, not unexpectedly, much lower than during the day. The
14 specific readings of the boat noise taken by Mr. Lilly in November 2004, and the conclusions
15 reached in the report, were ultimately revised to reflect additional sound reduction work done on
16 the vessel. (See, Ex. A-9B).

17 15.

18 The Pierce County Hearing Examiner issued a decision on the environmental appeals and
19 the shoreline permits on February 15, 2005. (Ex. RPC-3). The decision fully analyzed the
20 proposal and ultimately allowed the project, subject to a number of conditions. One condition
21 prohibited stocking or harvesting activities in Echo Bay between 9:30 p.m. and 6:30 a.m. in

1 consideration of noise concerns. Appellant Richard Kaupilla filed a Request for Reconsideration
2 of the Hearing Examiner's decision. The Examiner reconvened a hearing on July 30, 2005, to
3 take additional testimony on the noise issue because the engine on the vessel had been modified
4 to reduce noise since Mr. Lilly's November study.

5 16.

6 After the Echo Bay residents raised concerns about the noise that would be generated by
7 the Puget entering the Bay in the middle of the night, the applicants had a new, quieter, motor
8 installed in the vessel. Mr. Kaupilla asked the supplier for the best and quietest style available.
9 He also had what is referred to as a "hospital muffler" added to further reduce operating noise.
10 (Kaupilla testimony). As a result, the noise generated by the boat was substantially reduced. Mr.
11 Lilly conducted further noise analysis, as did Errol Nelson, P.E., an expert retained by the
12 applicants.

13 17.

14 Mr. Lilly revisited the site for additional measurements on April 29, 2005. He used the
15 same three monitoring points used in his first analysis. This time he noted low frequency noise
16 in the ambient background coming from jet engines at McChord Air Force Base (approximately
17 12 miles southeast of Echo Bay) that had not been present during the November test. (Ex A-9B,
18 p. 2). Some of the peaks during the boat engine testing were produced by the jet engine noise
19 rather than the boat noise. Mr. Lilly reported the noise from the boat was clearly audible and
20 very steady during the 15-minute period when the boat was idling in the middle of the bay.
21 Before the boat arrived, the background noise levels at Position 1 were approximately 30 to 32

1 dBA. While the boat was in the bay, the background noise levels were approximately 34 to 36
2 dBA. (Ex. A-9B p. 2, Figure 1 and accompanying text). At position 0, on Tanglewood Island,
3 the noise from the boat was measured at 37 dBA. (Ex. A-9B, p. 3, Figure 2 and accompanying
4 text). Mr. Lilly compared the boat noise to the ambient noise in Table 2 and found an increase
5 from 1:00 a.m. to 5:00 a.m. of .3 dBA at Position 2, 5.0 dBA at Position 1 and 8.5 dBA at
6 Position 0. (Ex. A-9B, p. 6).² Overall, Mr. Lilly concluded, “[t]he measurements suggest that
7 the noise radiated by the fishing boat has decreased significantly, compared to the November 11,
8 2004 measurements.” (Ex A-9B, p.5). Given the new information, Mr. Lilly, however, still
9 concluded the boat noise would adversely impact the neighboring residences due to the increase
10 over the very low nighttime ambient levels in the area. This was due, in part, to the “quality” of
11 the sound, i.e., the low tones generated by the boat while entering and idling in the bay.

12 18.

13 The applicants contracted with Errol Nelson, P.E. of Optimum Environment, for a study
14 of the noise generated by their newly outfitted fishing boat. Mr. Nelson gathered noise
15 measurements from the vessel on February 23, 2005, and prepared a report dated February 25,
16 2006. (Ex. R-4). He measured only the noise generated by the vessel, Puget, and did not
17 measure the ambient noise levels at Echo Bay. This was due to construction noise at Echo Bay
18 on the day of the test that interfered with measurement of the boat noise. Based on his off-site
19 measurements, he concluded the noise level from the idling boat is 35.5 dBA at a distance of 500

20 ² Mr. Lilly apparently adjusted the noise readings to reflect his perception that the boat was located in a spot further
21 from the microphones during the April testing than during the November testing. The validity of that calculation is
unclear on the record before the Board. As a result, the increase may be even less than that reported on Table 2.

1 feet. He believes this is very consistent with Mr. Lilly's study findings, despite the differing
2 methodology. Mr. Nelson indicated that research in the acoustical field establishes a general
3 noise threshold for sleep disturbance of 40 dBA. (Nelson testimony). Mr. Lilly does not think
4 the 40 dBA figure is an absolute. He contends the increase over background noise levels is the
5 most critical factor in creating a sleep disturbance. Pointing to EPA guidance, he asserts an
6 increase of 5 dBA over background noise levels is significant. (Lilly testimony).

7 19.

8 Pierce County has adopted a noise ordinance that allows nighttime noise limits of 45 dBA
9 in residential areas. (Ex. A9-A, p.5). The noise regulations are not directly applicable to the
10 Puget's operations because boats are technically exempt from the noise regulations. *Id.* All of
11 this acoustical information was reviewed by Pierce County before it rendered a final decision on
12 the SEPA appeal and the shoreline permits. (See, Ex-RPC-4). The noise ordinance is not part of
13 the Pierce County Shoreline Master Program, and does not apply to the operation of vessels.

14 20.

15 The Hearing Examiner issued a decision on the reconsideration dated August 19, 2005
16 (Ex. RPC-4). He modified the original restriction on the hours for stocking and harvesting to
17 read as follows:

18 No stocking or harvest activities shall be undertaken between the hours
19 of 9:30 p.m. and 8:00 a.m. except as follows:

- 20 a. The only activity during the restricted hours shall be off-
21 loading the herring (stocking the pens);

- 1 b. The vessel shall not make more than two off-loading
2 operations were (sic) night during the restricted hours;
- 3 c. The boat engine shall be at 1,000 rpm or less within one
4 quarter mile of the herring pens;
- 5 d. The light and deck noise on the boat within one quarter mile
6 of the pen shall be limited to that amount necessary for
7 safe operation of the vessel; and
- 8 e. The vessel shall not be at the pens for longer than 20 minutes
9 for any one off-loading operation.

10 (Ex. RPC 4, pp. 8-9). The Hearing Examiner's decision on Reconsideration was appealed to the
11 Shorelines Hearings Board in this case.

12 Based upon the foregoing Findings of Fact, the Board makes the following

13 CONCLUSIONS OF LAW

14 1.

15 The Board has jurisdiction over the parties and the subject matter of this case pursuant to
16 RCW 90.58.180. The Board considers the case *de novo* and the appealing parties have the
17 burden of proof to establish the permit approvals are inconsistent with the requirements of the
18 Shoreline Management Act, the Pierce County Shoreline Master Program, and the State
19 Environmental Policy Act.

20 SEPA Challenge

21 2.

The Board reviews Pierce County's decision on a SEPA DNS under a "clearly
erroneous" standard. *Hayden v. Port Townsend*, 93 Wn. 2d 870, 880, 613 P.2d 1164 (1980);

1 *Wenberg et al v. City of Snoqualmie*, SHB No. 00-034 (2001). A decision is considered clearly
2 erroneous when, although there is evidence to support it, the reviewing court is left with the
3 definite and firm conviction that a mistake has been made. *King Cy. v. Washington State*
4 *Boundary Review Bd.*, 122 Wn.2d 648, 661, 860 P.2d 1024 (1993). The clearly erroneous test
5 requires the government decision maker to demonstrate that it actually considered environmental
6 factors in reaching a decision. *Boehm v. City of Vancouver*, 111 Wn. App. 711, 718, 47 P.3d 137
7 (2002).

8 3.

9 In this case, Echo Bay Community Association contends Pierce County failed to
10 adequately consider several factors prior to issuing the SEPA DNS: (1) impacts to recreational
11 uses and existing navigation in Echo Bay, (2) noise impacts on the surrounding human
12 population and marine life, (3) aesthetic impacts to view, and from presence of pens, light, and
13 glare, (4) significant odor impacts on the surrounding population, and (5) significant impacts to
14 herring and salmon stocks.

15 4.

16 The Hearing Examiner's decisions in this case reflect the receipt of testimony and
17 exhibits relating to all of the topics challenged by the Association. The inclusion or omission of
18 complete material from the Environmental Checklist is not controlling on the issue of whether
19 the decision to issue a DNS was clearly erroneous. It is necessary to review the information the
20 County considered before it issued its final decision on the project and SEPA appeal. The record
21 before this Board reflects the County did evaluate impacts to recreation, navigation, and

1 aesthetics. The impacts generated by noise from the boat and glare from any lights were
2 specifically addressed by the Examiner's proceedings. Impacts to herring and salmon stocks
3 were also considered and determined to be minor. (Ex. RPC-4). As a result, any challenge
4 based solely on lack of procedural compliance with SEPA's mandate to consider environmental
5 impacts of a project prior to project approval is unsupported on the facts of this case.

6 5.

7 The Board is also asked to evaluate the DNS decision substantively. The Association
8 asks the Board to determine that Pierce County's conclusion that the environmental impacts will
9 not be significant is clearly erroneous. The Association asserts the net pens will harm existing
10 recreational uses in the bay and impair navigation of the waterway. The evidence shows the area
11 is used for a variety of water sports, particularly during the summer months. Some activities,
12 such as swimming and kayaking take place near the shore. Others, such as tubing and
13 waterskiing are primarily pursued in deeper, more open water. The net pens will be located at
14 least 500 feet from the shoreline in Echo Bay. This should provide ample passage for all types
15 of recreational craft using the bay. The pens will take up a very small proportion of the overall
16 water surface available (less than one half of one percent) and adequate area remains for all the
17 typical water uses identified. While it is understandable that the residents prefer completely
18 open water in the bay, the net pens will not present a substantial impediment to full use and
19 enjoyment of the waters of Echo Bay.

1 6.

2 The Association has raised a concern over the net pens' impact on safe navigation. As
3 indicated above, the pens will occupy a very small portion of the water surface in Echo Bay.
4 They will be properly marked with lights to warn boats of their location consistent with the U.S.
5 Coast Guard navigational standards. Passage is available on both sides of the pen for boats
6 navigating through the area. Space for anchoring will also be available for recreational boaters.
7 The much larger salmon pens were located on the same site for over twenty years with only two
8 known navigational problems. The evidence does not demonstrate a significant adverse impact
9 on navigation as a result of the proposed herring net pens.

10 7.

11 The local residents are also concerned the net pens will diminish the aesthetics of the area
12 by changing the view and by introducing nighttime light and glare. The pens are designed to
13 present a very low visual profile. The above water structures extend only twelve inches above
14 the water surface. The nets are all located underwater and would not harm the view from nearby
15 homes. The only lights associated with the operation are the minimal navigational safety
16 markers and the one light used during off-loading procedures. The light on the boat is directed
17 toward the pen and not toward the shore. It should not present a significant aesthetic problem for
18 the limited periods it will be used during the middle of the night.

19 8.

20 Odor impacts have also been cited as an area that was not adequately considered by
21 Pierce County. The record reflects conflicting testimony regarding the odors associated with

1 herring net pen operations. The pens in Mayo Cove do have noticeable odors connected with
2 their operation during the hot summer months. Pens located in Hale Passage apparently do not
3 emit any noticeable odor. The source of odors appears to be the nets. The conditions on this
4 project require the nets to be cleaned outside the area. This should minimize any potential for
5 odor impacts to the residents along Echo Bay.

6 9.

7 The Association also claims Pierce County failed to evaluate the project's impacts on
8 herring populations and salmon stocks. The evidence before the County regarding the project's
9 effects on other species was contained in the biological evaluation performed in connection with
10 the project. The biological evaluation was thorough and was accepted by the federal regulatory
11 agencies concerned with threatened and endangered species. The appellants presented no
12 evidence demonstrating that the net pen operation would pose any meaningful threat to herring
13 populations or salmon stock. In the absence of scientific data, the appellants' assertions do not
14 establish that the County's SEPA determination was clearly erroneous.

15 10.

16 The Echo Bay Association is particularly concerned about noise during the middle of the
17 night that would be generated by the herring off-loading process. The initial Environmental
18 Checklist did not contain specific data regarding any anticipated increase in nighttime noise
19 levels. However, during the later County appeal hearings and during the Board's hearing on this
20 case, both project opponents and project proponents presented detailed acoustical analysis. The
21 Pierce County Hearing Examiner had both noise studies and substantial testimony from both

1 experts before it in ruling on the SEPA challenge and the shoreline permits. (RPC Ex. 4, p.7).
2 The noise levels generated by the vessel will be in the range of 35 to 38.2 dBA. These readings
3 were obtained outdoors near the shoreline. The impacts to residents inside their homes would be
4 buffered somewhat by the walls, and masked to a degree by indoor background noise from
5 heaters, heat pumps, and fans. Exact estimates of the amount of reduction within interior
6 structures were not part of the acoustical work done on the project. The Examiner concluded
7 that the new motor was significantly quieter than the prior configuration and that it would not
8 create significant adverse effects to surrounding property owners. *Id.* The County engaged in a
9 meaningful review of noise impacts as part of reaching its decision on the merits of the net pen
10 project. Given the entirety of the information before the Board about the noise this operation
11 will produce, the Board is not convinced that the Hearing Examiner's decision under SEPA was
12 clearly erroneous.

13 11.

14 In a recent Board decision involving noise generated from a barge loading operation upon
15 local residents, however, the Board noted that the adequacy of noise analysis under SEPA and
16 whether the noise impacts are acceptable under the county shoreline master program and the
17 SMA are separate questions. *Preserve Our Islands, et al. v. King County et al.*, SHB Nos. 04-
18 009 & 04-010, p. 48 (Findings of Fact, Conclusions of Law, and Order)(2004). Noise impacts
19 are further discussed in this opinion under the shoreline permits sections.
20
21

1 Shoreline Permits

2 12.

3 The appeal also challenges Pierce County's approval of the SSDP and SCUP for the
4 project as well as Ecology's approval of the SCUP. The standards applicable to the SSDP for the
5 net pens are contained in Pierce County Code 20.24.020.³ Pierce County has developed a series
6 of policies and criteria for the review of applications for the placement and operation of
7 aquaculture facilities.

8 In lieu of specific standards relating to design, bulk, and use, the
9 following guidelines shall be applied to the County's reviewing authority
10 to a site specific project application for a substantial development permit
11 in arriving at a satisfactory degree of consistency with the policies and
12 criteria set forth in this Chapter and Chapter 20.30. To this end, the
13 County may extend, restrict, or deny an application to achieve said
14 purpose.

15 PCC 20.24.020(A).

16 Echo Bay contends the proposed herring net pens violate the Pierce County Aquaculture
17 regulations by: (1) failing to minimize conflicts between aquaculture use and navigational access
18 of current residents and recreational boaters (PCC 20.24.020(5)), and (2) failing to minimize
19 conflicts between the aquaculture use and visual access of current upland residents and the
20 general aesthetic quality of the shoreline (PCC 20.24.020(6)).

21 ³ Echo Bay Community Association is challenging Pierce County's characterization of the herring net pen use as
aquaculture. The issue is being pursued in another forum and will not be analyzed in this opinion. The Pierce
County Code provisions and characterization of the use as aquaculture will be used by the Board in rendering this
decision.

13.

The proposed net pens will not significantly impact navigational access for residents and recreational boaters. The pens are located well away from the shore and will not interfere with near shore water uses. The 500-foot clearance on either side of the pens will allow sufficient clearance for safe passage around the pens. The proposed pens are much smaller than the previous salmon pens, which did not cause undue navigational issues. The anchoring system being proposed for the herring pens will minimize the outward reach of anchoring cables and reduce the chance of interference with recreational craft. While the residents' desire to have completely open water in the bay is understandable, the presence of the net pens will not create a navigational problem and the project's configuration will minimize any potential impact on navigation.

14.

The Association contends the project fails to minimize conflicts between the aquaculture use and the visual access of current upland residents and the general aesthetic quality of the shoreline. The pens are designed to extend only twelve inches above the water surface and will only occupy less than one half of one percent of the water surface in Echo Bay. Given their low profile, the net pens will not block views from Echo Bay beaches or residences or impair any existing vistas. The net pen lighting will be the minimum to address navigational safety and should not diminish aesthetics in the area. The light on the vessel used for off-loading will be present no more than two times per night, during normal sleeping hours. It will be directed down onto the pens and should not create any aesthetic issue for nearby residents. The conditions on

1 the project will effectively minimize conflicts between the net pen use and the visual and
2 aesthetic qualities of the Echo Bay residents.

3 15.

4 The Association has alleged the SCUP is inconsistent with the Pierce County SMP and
5 the state's conditional use requirements. The Pierce County SCUP criteria are contained in PCC
6 Chapter 20.72.030.

7 The objective of a Conditional Use provision is to provide more
8 control and flexibility for implementing the regulations of the Master
9 Program. With provisions to control undesirable effects, the scope of
uses within each of the five environments can be expanded to include
many uses.

10 Uses considered to be Conditional Uses are those which may be
11 permitted provided all of the following criteria are met:

- 12 A. That there is some necessity for a shoreline site for the proposed
use or that the particular site applied for is essential for this use.
- 13 B. The use will cause no unreasonably adverse effects on the
environment or other uses.
- 14 C. That water, air, noise and other classes of pollution will not
exceed the level customarily found in that particular environment.
- 15 D. Design of the site will be compatible with the Master Program.
- E. The use will not interfere with public use or public shorelines.

16 PCC 20.72.030.

17 16.

18 The Association argues the net pens do not have to be located in Echo Bay and that the
19 particular site is not essential for this use. PCC 20.72.030(A). The first phrase of the regulation,
20 however, indicates that there only need be "some necessity for a shoreline site for the proposed
21 use." The aquaculture operation is an undertaking that makes particular use of the waters of

1 Puget Sound to keep the fish alive during their cultivation for bait. Net pen facilities are
2 expected to use water locations and they are the type of use that meets the criteria of having
3 “some necessity” for a shoreline site.

4 17.

5 The residents contend the project will cause unreasonable adverse effects on the
6 environment in violation of PCC 20.72.030(B). The alleged impacts include noise, odors, and
7 light as well as impacts to navigation and aesthetic values of the shoreline. Many of these
8 enunciated impacts have been addressed previously in the analysis of SEPA compliance and the
9 SSDP criteria. The evidence before the Board does not establish “unreasonable” adverse effects
10 on the environment as a result of this project. Odors are not expected from the operation as
11 proposed. Light will be very minimal and will occur primarily during sleeping hours. The
12 Board has concluded above that safe navigation will not be compromised by the proposal and
13 that aesthetic values of the shoreline will be essentially undisturbed. Accordingly, the Board
14 does not consider that there will be any “unreasonable” effects on the environment from these
15 sources and finds no violation of PCC 20.72.030(B). Whether the potential noise impacts from
16 this operation violate the provisions of this section is discussed together with the prohibitions
17 under PCC 20.72.030(C).

18 18.

19 The Association also argues the project will exceed the levels of noise, light, and air
20 quality customarily found in the particular environment in violation of PCC 20.72.030(C). The
21 Pierce County Code, SMP requires impacts to be considered within *the particular environment*.

1 PCC 20.72.030(B) also prohibits unreasonable effects upon the environment. The Board
2 therefore looks to whether the noise will produce unreasonable effects within the particular cove
3 of Echo Bay. Other areas such as Commencement Bay in Pierce County, may contain
4 substantial residential development, but the Pierce County SMP indicates that not one size fits
5 all. Each particular environment must be reviewed in its own right. The increase over ambient
6 noise level is an important factor, though not the sole factor, in evaluating the significance of the
7 noise impact. The absolute noise level is also a component of overall impact. Pierce County
8 noise regulations, while not controlling, also provide insight into the severity of noise levels. In
9 *Preserve Our Islands*, the Board considered the King County noise ordinance in analyzing
10 whether the project noise complied with the requirements of the King County SMP and the
11 SMA. *Id* at 49.

12 19.

13 The Board is not convinced that any increase in existing noise over 5 dBA is considered
14 an unreasonable effect upon the quiet Echo Bay area for either shoreline or SEPA purposes.
15 This project will cause a modest increase in nighttime noise for a maximum of two twenty-
16 minute periods per night. Although protecting noise levels of the shoreline is required by the
17 SMA and the Pierce County SMA⁴, the conditions attached to the project approval by the
18 Hearing Examiner are sufficient to provide these protections.

19
20 _____
21 ⁴ See, *Preserve Our Islands* at p. 49.

20.

The Hearing Examiner attached certain conditions on the project approval designed to minimize any noise impact including: (1) limiting the activity during the period 9:30 p.m. and 8:00 a.m. to off-loading the herring into the pens, (2) limiting the vessel to two off-loading operations per night, (3) requiring the boat engine to be at 1,000 rpm or less within one quarter mile of the herring pens, (4) limiting the light and deck noise on the boat within one quarter mile of the pen to that amount necessary for safe operation of the vessel, and (5) limiting the off-loading operation to no longer than 20 minutes for any one trip. These conditions are all important safeguards to minimize any noise impact on the surrounding neighbors. Additional conditions are necessary to provide assurance noise levels will be maintained at the anticipated levels.

21.

To assure the noise levels can be monitored for compliance purposes, a measurable standard for noise must be incorporated into the permit. The net pen operation shall not exceed 40 dBA at the distance of 500 feet during the restricted hours of 9:30 p.m. to 8:00 a.m. To determine the level of noise during actual operations, the applicants shall perform an acoustical study during the first year of operation with readings taken three times during the herring season at times representative of different portions of the year. The study shall use the same basic methodology as the Lilly study and will compare boat noise at idle to ambient noise during the restricted nighttime hours. The test results shall be submitted to Pierce County at the conclusion of the study.

1 22.

2 The Association further contends the project violates PCC 20.72.030 because it will
3 interfere with the public's navigation and use of Echo Bay. As concluded above, the net pens
4 will provide ample clearance for safe navigation of Echo Bay by all known users. Near shore
5 uses will be unimpeded and sufficient open water (approximately 500 feet) remains on each side
6 of the pens for safe water skiing, tubing and other recreational boating. The evidence does not
7 support a violation of PCC 20.72.030(E).

8 23.

9 The state provisions addressing conditional use approval are found at WAC 173-27-160.
10 The appellants contend the proposal violates the following provisions: (1) The proposed use will
11 interfere with the normal public use of the public shorelines, WAC 173-26-160(1)(b), (2) The
12 proposed use is not compatible with other permitted use in the area, WAC 173-26-160(1)(c), (3)
13 The proposed use will cause unreasonably adverse effects to the shoreline environment in which
14 it is located, WAC 173-26-160(1)(d), and (4) The public interest will suffer substantially
15 detrimental effect from noise, light, odors, navigation impacts, and aesthetic impacts, WAC 173-
16 26-160(1)(e).

17 24.

18 Interference with normal public use of the public shorelines has been addressed
19 previously in this opinion. The net pens will not prevent or impair any identified use of the
20 public shoreline in Echo Bay. The pens will have to be avoided, but sufficient water surface is
21 available to accommodate normal public uses. The net pens appear to be compatible with other

1 uses permitted in the area. No harm to views from the residences, interference with beach uses,
2 or aesthetic impacts precluding normal waterfront residential activities has been demonstrated.
3 The Board has already concluded the project will not cause unreasonably adverse effects to the
4 shoreline in which it is located. Likewise, the public interest will not suffer substantial
5 detrimental effects from the light, noise, odors, navigation, and aesthetic impacts. Accordingly,
6 the Board does not find a violation of the provisions in WAC 173-27-160.

7 25.

8 Any Finding of Fact deemed to be properly considered a Conclusion of Law is hereby
9 adopted as such.

10 Based upon the foregoing Findings of Fact and Conclusions of Law, the Board enters the
11 following:

12 ORDER

13 The appellants have failed to establish Pierce County's SEPA DNS was clearly
14 erroneous. The evidence also fails to establish that Pierce County's approval of the SSDP and
15 SCUP with conditions was erroneous or that Ecology's approval of the SCUP was erroneous.
16 The appeal is therefore, DISMISSED and the permit approvals are AFFIRMED subject to the
17 following additional conditions:

- 18 1. The net pen operation shall not exceed 40 dBA at the distance of 500 feet
19 during the restricted hours of 9:30 p.m. to 8:00 a.m.
- 20 2. To determine the level of noise during actual operations, the applicants
21 shall perform an acoustical study during the first year of operation with

1 readings taken three times during the herring season on dates
2 representative of different portions of the year. The study shall use the
3 same basic methodology as the Lilly study and will compare boat noise at
4 idle to ambient noise during the restricted nighttime hours. The test
5 results shall be submitted to Pierce County at the conclusion of the study.

6 DONE this 14th day of April 2006.

7 SHORELINES HEARINGS BOARD

8 William H. Lynch, Chair

9 Kathleen D. Mix

10 Judy Wilson

11 O'Dean Williamson

12 Dan Smalley

13 Phyllis K. Macleod
14 Administrative Appeals Judge